No. [illegible]

In the Supreme Court of the United States

October Term, 1948

Nathan D. Lehman and Samuel Marion,
Petitioners

v.

Alexander Guterman, George Geller and Arthur Ballon, Individually and as Officers and Members of the Committee of Preferred Stockholders of Pittsburgh Terminal Coal Corporation, Howard S. Guterman, Monroe Guterman, Rudolph Guterman, Irene Guterman and Elizabeth Wolfers

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AMICUS CURIAE

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OCTOBER TERM, 1948

No. 88

NATHAN D. LEIMAN, AND SAMUEL MARION, PETITIONERS

v.

ALEXANDER GUTTMAN, GEORGE GELLER AND ARTHUR BAINTON, INDIVIDUALLY AND AS OFFICERS AND MEMBERS OF THE COMMITTEE OF PREFERRED STOCKHOLDERS OF PITTSBURGH TERMINAL COAL CORPORATION, HOWARD S. GUTTMAN, MONROE GUTTMAN, RUDOLPH GUTTMAN, IRENE GUTTMAN, AND ELIZABETH WOLFERS

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

This controversy arises as an incident to the reorganization of Pittsburgh Terminal Coal Corporation, a debtor in reorganization under Chapter X of the Bankruptcy Act (11 U. S. C. § 501 *et seq.*) in the United States District Court for the Western District of Pennsylvania. The Securities and Exchange Commission has participated in the reorganization proceedings pursuant to Section 208 of Chapter X (11 U. S. C.

§ 608). In the proceedings before the New York Court of Appeals, the Commission filed a brief *amicus curiae* pursuant to permission granted by that Court. This brief is submitted by the Commission as *amicus curiae* in support of the respondents.

OPINIONS BELOW

The opinion of the Special Term of the New York Supreme Court has been published in 71 N. Y. S. (2d) 200 (R. 25–26). The Appellate Division, First Department, affirmed without opinion, two Justices dissenting, 272 App. Div. 896, 72 N. Y. S. (2d) 406 (R. 29). The opinion of the New York Court of Appeals (R. 31–36), reversing the Special Term and the Appellate Division, is reported in 297 N. Y. 201.

JURISDICTION

The judgment of the New York Court of Appeals was entered on March 12, 1948 (R. 37–38). A motion for reargument was denied on July 16, 1948, reported at 298 N. Y. 618. A petition for a writ of certiorari was filed June 10, 1948, and granted October 11, 1948 (R. 39). Jurisdiction of this Court is invoked under 28 U. S. C. 1257.

QUESTION PRESENTED

The following question, certified by the Appellate Division for review by the New York Court of Appeals (R. 27–28), is now before this Court:

> Has the Supreme Court of the State of New York jurisdiction over the subject

matter of this action to recover for legal services rendered to the stockholders committee which are not compensable out of the assets of the Debtor's estate, in a Chapter X reorganization proceeding under the United States Bankruptcy Act?

The New York Court of Appeals answered this question in the negative, holding that the state court had no jurisdiction because the subject matter involved herein was within the exclusive jurisdiction of the bankruptcy court wherein the reorganization proceedings were pending.

STATUTES INVOLVED

The pertinent provisions of Chapter X involved in this case are set forth in Appendix A, *infra*, pp. 37–38.

STATEMENT

In 1940–41 petitioners and another attorney (hereinafter referred to as "the attorneys") were retained as counsel for a Protective Committee representing public holders of the preferred stock of Pittsburgh Terminal Coal Corporation, the debtor in reorganization. Sometime thereafter, the attorneys, apparently concerned lest the work for which they had been engaged might not be compensated, or might be inadequately compensated, out of the estate, sought from the Committee a more definite commitment with respect to their compensation. In 1943, following a period of negotiation, an agreement was executed. This agreement, which took the form

of a letter from the Chairman of the Committee, stated that the Committee had secured 584 shares of the debtor's preferred stock from four named stockholders—two being members of the Committee and the other two individual stockholders—for the purpose of affording the attorneys "additional compensation" for their services in the proceedings. The letter agreement further stated that the shares of preferred stock thus obtained will be held in escrow for delivery to the attorneys at such time as the reorganization proceedings "are finally terminated and a final settlement of all suits and claims made by this Committee in behalf of the preferred stockholders have been settled." Delivery of the escrowed stock was further conditioned upon satisfactory performance by the attorneys of their "duties as counsel to this Committee until the termination of all proceedings". (R. 4–6, 10–11.)

On October 3, 1945, after confirmation of the plan of reorganization, the attorneys applied to the federal bankruptcy court for an allowance out of the debtor's estate of fees in the amount of $125,000 for all services rendered to the Committee (R. 5). This application was construed by the District Judge as a waiver of the attorneys' rights for additional compensation under the escrow agreement, and accordingly, in allowing the attorneys total fees of $37,500 by order dated November 16, 1945, the Judge qualified the allowance by providing that the "present order

is made upon the statement that the original agreement with the Protective Committee is set aside" (R. 18). On November 26, 1945, this qualification was vacated by the judge on *ex parte* application of the attorneys (R. 18–19), and on January 17, 1946, was reinstated upon the Committee's application for lack of notice (R. 19). The attorneys thereupon moved by formal petition for a modification of the order of November 16, 1945, claiming that the fee allowances out of the debtor's estate should have been granted without prejudice to the rights of the attorneys to the escrowed stock as additional compensation under the agreement. At the hearing on this petition, the Committee appeared and, although assenting to the jurisdiction of the court, disputed the right of the attorneys to further compensation under the agreement, while the attorneys took the position that the bankruptcy court lacked jurisdiction over the escrow agreement and opposed any determination of the fees payable thereunder (R. 19). The Commission as a party to that proceeding urged that the bankruptcy court had exclusive jurisdiction to determine the reasonable worth of all the attorneys' services. On the assumption that the attorneys were entitled to some payment under the escrow agreement, the Commission recommended $70,000 as the reasonable value of all the services, whether or not compensable out of the estate. Had this recommendation been followed

by the reorganization judge, petitioners would have received $32,500 under the escrow agreement in addition to the $37,500 allowed by the court out of the estate.

As set forth in its opinion of January 22, 1947 (R. 17–23), reported in *In re Pittsburgh Terminal Coal Corp.*, 69 F. Supp. 656 (W. D. Pa.), the District Court concluded that it was without jurisdiction to enforce the agreement and to determine the amount due the attorneys thereunder. Accordingly, the District Court modified its order of November 16, 1945, to provide that the allowance to the attorneys of $37,500 out of the debtor's estate was without prejudice to whatever rights they might have under the escrow agreement (R. 17). No appeal was perfected from the District Court's order.[1]

Thereafter, the attorneys instituted in the New York Supreme Court the present suit for specific performance of the agreement and for delivery of the stock in accordance with the terms of the escrow agreement and other appropriate relief (R. 8–11). Respondents filed a motion to dismiss for lack of jurisdiction, contending that the bankruptcy court in which the reorganization proceedings were pending had exclusive jurisdiction over the subject matter (R. 3–7). By order entered April 7, 1947, the trial court denied the

[1] Although the Commission is a statutory party in Chapter X proceedings, it has no standing to appeal. Section 208, 11 U. S. C. § 608.

motion to dismiss (R. 25–26). This order was affirmed by order of the Appellate Division dated June 24, 1947, two justices dissenting (R. 29). The Court of Appeals, three justices dissenting, reversed the court below, holding that the motion to dismiss the action should have been granted (R. 31–38).

ARGUMENT

In *Brown* v. *Gerdes*, 321 U. S. 178, this Court held that under Section 221 (4) (11 U. S. C. § 621 (4)), the bankruptcy court has exclusive jurisdiction over attorney's fees payable out of the debtor's estate. The question here is whether Section 221 (4) is similarly applicable to fees incident to the reorganization but not payable out of the estate. It is our view, that the bankruptcy court has jurisdiction to determine all fees for legal services rendered by petitioners as counsel for a protective committee representing public security holders, even though the fees agreed upon are to be paid by security holders (Point I), and that such jurisdiction is necessarily exclusive (Point II).

I

THE BANKRUPTCY COURT HAS JURISDICTION TO FIX THE AMOUNT OF ALL FEES FOR LEGAL SERVICES PERFORMED BY COUNSEL FOR A COMMITTEE IN A REORGANIZATION PROCEEDING REGARDLESS OF THE SOURCE OF PAYMENT OF SUCH FEES

1. The power to review and determine compensation payable from a source other than the

debtor's estate is vested in the bankruptcy court by Section 221 (4),[2] which provides:

> The judge shall confirm a plan if satisfied that * * *
>
> (4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan *or by any other person,* for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and *incident to* the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge. [Italics supplied.]

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[2] The court below, although referring to Section 221 (4), also thought that Section 242 (11 U. S. C. § 642) "governs this case" (R. 33). This section reads as follows:

"The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in connection with the administration of an estate in a proceeding under this chapter or in connection with a plan approved by the judge, whether or not accepted by creditors and stockholders or finally confirmed by the judge—

"(1) by indenture trustees, depositaries, reorganization managers, and committees or representatives of creditors or stockholders;

"(2) by any other parties in interest except the Securities and Exchange Commission; and

"(3) by the attorneys or agents for any of the foregoing except the Securities and Exchange Commission."

It has been the Commission's view that this case is governed by Section 221 (4), the broad statements of which are clearly applicable to the fee agreement involved herein, without regard for Section 242.

It is obvious from a mere reading of the text that this section does not limit the bankruptcy court's powers over fees merely to such as are to be charged to the debtor's estate. It expressly requires disclosure to the bankruptcy court of "all payments made or promised" either by the debtor or "by any other person" for services rendered "in connection with," or "incident to," the reorganization or the plan, and further provides for court approval of such payments only if the amount agreed upon is "reasonable," or, if payable after confirmation, "will be subject to the approval of the judge." Clearly, such explicit and broad language is applicable to the fee agreement which is the subject of the present action.

Section 221 (4) expands and defines more affirmatively the control over reorganization fees which bankruptcy courts had exercised to an extent under the less comprehensive provisions of former Section 77B, 48 Stat. 911, 912. Section 77B (f) (5), the predecessor to Section 221 (4), provided only for judicial scrutiny and approval of fees for services in the reorganization rendered by "committees or reorganization managers," whether or not payable "by the debtor or any corporation or corporations acquiring the debtor's assets."[3] Nevertheless, on the basis of

[3] Section 77B (f) (5) provided that "the judge shall confirm the plant if satisfied that * * * (5) all amounts to be paid by the debtor or by any corporation or corporations acquiring the debtor's assets, and all amounts

the court's statutory power to review all agreements affecting the interests of creditors in the reorganization, it had been held that the bankruptcy court had the responsibility to review fees agreed to be paid by creditors directly and not the debtor's estate.[4] Section 221 (4) now affirms that responsibility more explicitly by requiring judicial review of all fees, including private fee arrangements between security holders and those authorized to represent them in the reorganization proceedings.[5] As the court said in *In re P–R Holding Corp.*, 147 F. (2d) 895, 899 (C. C. A. 2), Section 221 (4) was

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to be paid to committees or reorganization managers, whether or not by the debtor or any such corporation for services or expenses incident to the reorganization, have been fully disclosed and are reasonable, or are to be subject in the approval of the judge".

[4] See *In re McCrory Stores Corp.*, 19 F. Supp. 917 (S. D. N. Y.), affirmed, 91 F. (2d) 947 (C. C. A. 2), certiorari denied, 302 U. S. 725, pp. 21–23, *infra*. (See also Appendix B, *infra*.)

[5] See *Woods* v. *City Nat. Bank & Trust Co.*, 312 U. S. 262, 267, wherein it is stated that under Section 221 (4) "the bankruptcy court has plenary power to review *all* fees and expenses in connection with the reorganization from whatever source they may be payable." [Italics supplied.]

This is also the view expressed in the Report on Chapter X by the Senate Committee on the Judiciary, S. Rep. No. 1916, 75th Cong., 3d Sess., which states at p. 36:

"Subsection (4) of section 221, derived from section 77B (f) (5), requires full disclosure and the approval by the judge of *all* payments for services, and for costs and expenses, in connection with the plan or the proceedings, whether such payments are made or promised by the debtor, or by any corporation succeeding to it, or *by any other person*." [Italics supplied.]

aimed to eliminate the practice of fixing reorganization fees and expenses by private arrangement, thereby decreasing the effective amount of recovery of the creditors.[6]

2. Extensive investigations conducted by the Congress and by the Commission prior to the passage of Chapter X disclosed widespread abuses in equity receivership proceedings, whereby all too often protective committees and their counsel had used their strategic position in the reorganization for their own benefit and to the detriment of public security holders, including the exaction of substantial fees and expenses having no reasonable relation to the value of services rendered.[7] For in equity receivership

[6] This is also the interpretation given by this Commission in its report to Congress on its investigation into the activities and functions of protective committees. See Appendix B, *infra*.

[7] Section 77B was revised following an investigation by a Special Senate Committee to Investigate Receivership and Bankruptcy Proceedings, S. Doc. No. 268, 74th Cong., 2nd Sess.; and an extensive study by the Securities and Exchange Commission entitled *Report on the Study and Investigation of the Work, Activities, Personnel, and Functions of Protective and Reorganization Committees*, Parts I–VII (1937–1938), hereinafter referred to as *S. E. C. Protective Committee Report*. Part VIII, published in 1940, is a summary volume.

The Commission's Report is referred to in S. Rep. No. 1916, 75th Cong., 3d Sess., p. 20, fn. 1; see also statement by Representative Chandler in 83 Cong. Rec. 9110 (June 13, 1938).

reorganizations, the payment of fees generally was arranged outside of the receivership, usually through the device of a separate charge upon the security holders who had assented to the plan of reorganization,[8] and the court had little or no control over these charges. The deposit agreement, under which most committees functioned, was viewed as a private contract between the committee and the security holders;[9] and under its terms the committee was given not only a lien on the deposited securities for the payment of all fees and expenses but in most cases also the sole right to determine the amount to be charged

On fees and expenses, see *S. E. C. Protective Committee Report*, Part I, pp. 211–217, 642–660; Part II, pp. 351–373; Part III, pp. 55–61, 125–127, 152–193; Part IV, pp. 87–97; Part VIII, pp. 231–269.

[8] See statement of Judge Coxe in *In re Paramount-Publix Corp.*, 12 F. Supp. 823, 827 (S. D. N. Y.); *United States* v. *Chicago, Milwaukee, St. Paul & P. Railroad Co.*, 282 U. S. 311; see also *S. E. C. Protective Committee Report*, Part I, pp. 642–648; Part III, 55–56, 59–60; Part IV, p. 62; Part VIII, p. 254; Finletter, *The Law of Bankruptcy Reorganization*, 17 (1939).

[9] *Habirshaw Electric Cable Co.* v. *Habirshaw Electric Cable Co., Inc.*, 296 Fed. 875 (C. C. A. 2), certiorari denied, 265 U. S. 587; *Fuller* v. *Venable*, 118 Fed. 543 (C. C. A. 4). Cf. also *United States* v. *Chicago, Milwaukee, St. Paul & P. Railroad Co.*, 282 U. S. 311. This case involved an equity receivership reorganization and arose prior to the passage of Section 77. This Court held that the Interstate Commerce Commission, though having jurisdiction over securities issued in railroad reorganization, did not have the power under Section 20a of the Interstate Commerce Act to inquire into the fairness of compensation provided for in an agreement between the protective committee and the security holders.

without any provision for independent review.[10] Moreover, an independent action for damages or for an accounting, even within the limits of the agreement, was generally beyond the resources of the individual security holders[11] and was thwarted to a large extent by the broad exculpatory clauses which often found their way into the depositary agreement.[12]

The foregoing practices led to such serious abuses that at one time it was recommended that committees should be prohibited from looking to security holders for any compensation at all

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[10] In *S. E. C. Protective Committee Report*, Part I, pp. 646–647, the Commission noted:

"This means that in the 705 cases not associated with Section 77 or Section 77B proceedings machinery was provided for having some independent person or agency review the amount of the fees and expenses of these committees in only 2.13 percent of the cases. In the balance of the cases, numbering 690, the committee had reserved to itself the right to determine, within the limits prescribed by the agreement, the amount which it could charge for fees and expenses. And in 403 of these 690 cases, the agreements prescribed no limitations. These fiduciaries, therefore, had in the vast majority of the cases provided machinery whereby they became the sole arbiters of the worth of their own services and of the propriety of their expenses. As we have pointed out, it was usually provided that the compensation to be fixed by the committee must be 'reasonable.' But this restriction in and of itself would mean little, since the committee, and the committee alone, was to determine what was 'reasonable'."

[11] See *S. E. C. Protective Committee Report*, Part I, p. 647.

[12] See, for example, *Van Sicklen* v. *Bartol*, 95 Fed. 793 (E. D. Pa.). See, generally, *S. E. C. Protective Committee Report*, Part VIII, pp. 217–221, 237–241.

and be limited to such compensation as the bankruptcy court might allow out of the estate.[13] Although this recommendation was not expressly adopted,[14] supervision by the bankruptcy court of fees to be charged to the security holders by a committee or its counsel was obviously necessary and was expressly provided for in Chapter X. To place the fee agreement, such as is involved herein, beyond the purview of the bankruptcy court is to ignore the broad provisions of Section 221 (4) and other statutory and equitable powers of the bankruptcy court discussed below, as well as to open the door to the very evils which Congress had intended to eliminate by centralizing control over all fees in the bankruptcy court.

3. Judicial scrutiny over the fee claims of petitioners herein must also be viewed as but an integral part of the control over protective committees and its agents which was exercised by the bankruptcy court under Section 77B, and which Chapter X intended to broaden and to render more effective.[15] Such controls are all-inclusive. They extend to qualification of the committee's

[13] See Special Senate Committee to Investigate Receivership and Bankruptcy Proceedings, S. Doc. No. 268, 74th Cong., 2d Sess., p. 41.

[14] *Cf.* Section 212, note 23, *infra*, which authorizes the bankruptcy court to disregard any agreement affecting the interests of security holders if the agreement is "unfair or not consistent with public policy."

[15] See *Securities and Exchange Commission* v. *U. S. Realty & Improvement Co.*, 310 U. S. 434, 448–450.

personnel, as well as to every aspect of its functions and activities. For example, the bankruptcy court could disqualify a person with conflicting interests from serving on a committee for public security holders,[16] and could enjoin the committee from communicating with the security holders it otherwise represents if the proper administration of the reorganization so requires.[17] Courts of bankruptcy also have denied compensation to committees and their attorneys or to any other fiduciary for trading in the securities of the debtor in the course of the reorganization,[18] or

[16] *In re Realty Associates Securities Corp.*, 56 F. Supp. 1008 (E. D. N. Y.); *In re Rosenbaum Grain Co.*, 13 F. Supp. 600 (N. D. Ill.).

[17] *In re Schroeder Hotel Co.*, 86 F. (2d) 491 (C. C. A. 7). See also *In re Glen Sheridan Realty Trust*, 90 F. (2d) 466 (C. C. A. 7).

In the *Schroeder* case, *supra*, the court after citing the "scrutiny clause" of former Section 77B (b) (10) said at pp. 493–494:

"* * * Obviously, the court, in view of the purpose of the act and its express provisions, has the power to make effective the jurisdiction granted by Congress under the constitutional power in bankruptcy and to prohibit acts of parties before it, tending to prevent the exercise of the jurisdiction and the achievement of its purposes. If this power does not exist, the purpose of the law and the jurisdiction of the court to enforce it are defeated. To prevent the attainment of the legitimate ends contemplated 'is to defeat the very end the accomplishment of which was the sole aim of the section' and thereby to render its provisions futile.' *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648, 55 S. Ct. 595, 606, 79 L. Ed. 1110."

[18] See *In re Paramount-Publix Corp.*, 12 F. Supp. 823 (S. D. N. Y.); *In re Republic Gas Corp.*, 35 F. Supp. 300 (S. D.

where an actual or potential conflict of interest was shown;[19] and in the exercise of its equitable powers the bankruptcy court will require an accounting for any pecuniary profits a fiduciary may secure from his position of trust in the reorganization.[20]

To render the Court's control more effective, its supervisory powers have been extended specifically to all agreements under which committees or other persons may serve in a representative capacity for public security holders.[21] Thus, under Section 211 (11 U. S. C. § 611) committees or other persons representing twelve or more creditors or stockholders, who appear in the proceedings, are required, *inter alia* to file under oath a statement to include, among other things, a copy of the instrument authorizing the

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N. Y.): *In re Midland United Co.*, 159 F. (2d) 340 (C. C. A. 3). This equitable doctrine is presently embodied in Section 249, 11 U. S. C. § 649.

[19] *Woods* v. *City Nat. Bank & Trust Co.*, 312 U. S. 262; *American United Mutual Life Insurance Co.* v. *City of Avon Park*, 311 U. S. 138.

[20] *Young* v. *Higbee Co.*, 324 U. S. 204; *Young* v. *Potts*, 161 F. (2d) 597 (C. C. A. 6).

[21] See *In re Realty Associates Securities Corp.*, 56 F. Supp. 1008, 1009 (E. D. N. Y.). See also Senate Report No. 1916 on H. R. 8046, 75th Cong., 3d Sess., p. 33, wherein it is stated:

"Sections 210, 211, and 212 grant to the judge control over protective committees and other representatives of creditors and stockholders. To enable the judge to exercise his control effectively, relevant information is required to be furnished to the court concerning employment and interests of such representatives, and the interests of the persons represented."

representation and a recital of the pertinent facts and circumstances pertaining to their employment.[22] The purpose of these disclosure requirements is indicated in part by the so-called "scrutiny clause" included in Section 212, pursuant to which the court is empowered to set aside any such agreements or any terms thereof which the bankruptcy court finds to be "unfair or not consistent with public policy."[23]

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[22] Section 211 provides in pertinent part:

"Every person or committee, representing more than twelve creditors or stockholders, and every indenture trustee, who appears in the proceeding shall file with the court a statement, under oath, which shall include—

"(1) a copy of the instrument, if any, whereby such person, committee, or indenture trustee is empowered to act on behalf of creditors or stockholders;

"(2) a recital of the pertinent facts and circumstances in connection with the employment of such person or indenture trustee, and, in the case of a committee, the name or names of the person or persons at whose instance, directly or indirectly, such employment was arranged or the committee was organized or formed or agreed to act; * * *."

[23] Section 212 provides that:

"The judge may examine and disregard any provision of a deposit agreement, proxy, power or warrant of attorney, trust mortgage, trust indenture, or deed of trust, or committee or other authorization, by the terms of which an agent, attorney, indenture trustee, or committee purports to represent any creditor or stockholder, may enforce an accounting thereunder, may restrain the exercise of any power which he finds to be unfair or not consistent with public policy and may limit any claim or stock acquired by such person or committee in contemplation or in the course of the proceeding under this chapter to the actual consideration paid therefor."

It may be noted that Section 212 refers to "creditor or stockholder." Section 77B (b) (10), the predecessor provision to Section 212 referred only to "creditor."

The basic assumptions underlying these various statutory or equitable controls is that with the wide diffusion in the ownership of corporate securities, protective committees and their agents occupy a strategic position in the reorganization; that any agreements between committees and security holders is bound to be one-sided; that unless all aspects of the committees' functions, including agreements with security holders, are subject to the supervision and regulation by the reorganization tribunal or some other specialized agency,[24] the standard of loyal and disinter-

[24] Compare Section 77 (p), 11 U. S. C. § 205 (p), which provides in substance that committees or any other persons may solicit proxies or deposits in a pending proceeding, only upon prior application to the Interstate Commerce Commission, which must disclose certain relevant information, including "the compensation and expenses to be received by the applicant, its agents and attorneys, for their services." Section 77 (p) further provides in pertinent part that such solicitations may be authorized by order only if the Commission "* * * finds that the terms and conditions upon which such solicitation, use, employment or action is proposed are reasonable, fair, and in the public interest, and conform to such rules and regulations as the Commission may provide."

The purpose of this provision is to protect the public, the security holders and the debtor corporation against excessive fees payable either by the debtor or by the security holders. See House Rep. No. 1283 on H. R. 8587, 74th Cong., 1st Sess. p. 3 (1935). See also Special Rules of Procedure promulgated by the Interstate Commerce Commission under Section 77 (p), paragraphs 9 (j), (q) and (r), C. C. H. Bankruptcy Law Ser. ¶ 7101.

The explicit reference to compensation and expenses in Section 77 (p) was probably inserted in view of this Court's decision in *United States* v. *Chicago, Milwaukee, St. Paul &*

ested service[25] cannot be fully attained, and injury to the interests of public security holders follows.

4. We believe that the foregoing considerations necessarily extend to all fee arrangements, and make it essential that the bankruptcy court inquire into the propriety and fairness of the compensation which security holders may have agreed to pay a committee, its counsel or any other person serving in a representative capacity in the reorganization. Even in ordinary trust administration, courts of equity have exercised control over trustees' allowances and for good cause have

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P. Railroad Co., 282 U. S. 311, summarized note 19, *supra*. See statement of Senator Wheeler on this subsection, 79 Cong. Rec. 13,765 (Aug. 20, 1935).

Somewhat comparable controls were vested by the Michigan legislature in an administrative agency created under a special statute passed to supervise and regulate protective committees within that state. See Mich. Stats. Ann. 1938 §§ 27.1296, 27.1297. For a discussion of the Michigan Public Trust Commission Act see *S. E. C. Protective Committee Report*, Part VIII, pp. 387–417.

The administrative controls over protective committees in California are discussed in *S. E. C. Protective Committee Report*, Part VIII, pp. 367–386. Jurisdiction by the Commissioner of Corporations over protective committees is based on the state Blue Sky Law, Deering Gen. Laws 1944, Act 3814, section 2 (a) of which includes certificate of deposit within the definition of "security." This was supplemented in 1937 by the enactment of the Securities Owners Protection Law, Deering Gen. Laws 1944, Act 3815.

[25] *Woods* v. *City Nat. Bank & Trust Co.*, 312 U. S. 262, 268; *American United Mutual Life Ins. Co.* v. *City of Avon Park*, 311 U. S. 138, 147.

even reduced or denied such compensation although previously fixed by the settlor or by statute.[26] As bankruptcy courts are courts of equity,[27] the adaptation of the same general powers for the purpose of limiting committees and their attorneys or other fiduciaries to fees reasonably commensurate with the value of their services is, indeed, appropriate to the needs and requirements of bankruptcy reorganization. It follows, accordingly, that the agreement defining the terms and conditions under which the committee or its counsel is to represent security holders in the reorganization, including the cost of such representation to security holders, can no longer be regarded as a mere private contract subject to enforcement in accordance with its terms. In view of the all-inclusive provisions of Section 221 (4), the disclosure requirements of Section 211 and the broadened scrutiny provisions of Section 212, it is essential that such agreements be subject to judicial examination by the bankruptcy court, in order to safeguard the integrity of the reorganization process and to afford the public security holders the assurance that the committee and its attorneys will discharge their fiduciary responsibilities without overreaching and in a

[26] See 4 Bogert, *Trusts and Trustees* §§ 972, 979. See also Lewin, *Trusts*, 403–404 (14th ed. 1939).

[27] *Pepper v. Litton*, 308 U. S. 295, 304; *American United Mutual Life Ins. Co.*, 311 U. S. 138, 145.

manner which is fair and compatible with reorganization standards.[28]

A striking illustration is afforded by *In re McCrory Stores Corp.*, 19 F. Supp. 917 (S. D. N. Y.), affirmed 91 F. (2d) 947 (C. C. A. 2), certiorari denied, 302 U. S. 725, decided under the less inclusive provisions of Section 77B. In that case, a committee of creditors engaged an attorney, paying him a retainer of $25,000 and agreeing to pay him a further 10% of any proceeds paid to creditors. Eventually, creditors of the class represented by the committee were paid in full plus 19% interest. The aggregate amount to which the attorney would have been entitled under the contingent retainer at the conclusion of the case was over $64,000.00. Nevertheless, the District Court, after finding that the value of the attorney's services was $35,000, refused to permit him to collect the 10% contingent retainer agreed to between him and the committee and ordered an award to him of only $10,000 in addition to his fixed retainer of $25,000. Although, as we have seen (p. 9, *supra*), Section 77B (f) (5) provided only for judicial examination of fees to be paid to committees and reorganization managers out of the assets of the debtor's estate or by a successor corporation, the court held that the fee agreement was not enforceable. The court concluded that the congressional policy was to limit

[28] As illustrative of statutory standards applicable to fees claims see Section 62c, 249, 11 U. S. C. §§ 102c, 649.

attorneys representing public investors in reorganization to a reasonable fee commensurate with their services and that any agreement in contravention of that policy may be set aside under the "scrutiny clause" of Section 77B (b) (10). The district court stated (p. 921):

> * * * the duty is laid on the court to see to it that the amount to be received by counsel is no more than commensurate to the services rendered * * *
> * * * the standard of compensation set for those who perform services in the proceeding, whether payable by a group of creditors or out of the general funds of the estate, is the fair and reasonable worth of the services actually rendered, as distinct from the amount that may be agreed on by a committee in advance * * *.

On appeal, the Circuit Court of Appeals for the Second Circuit affirmed, holding that the "scrutiny clause" of Section 77B (91 F. (2d) at 949)—

> authorized him [the District Judge] to restrain the committee from proceeding under the contingent fee agreement after the reorganization petition was filed * * *.

And further (p. 950):

> Congress would certainly seem to have a * * * right to authorize the court in bankruptcy proceedings to allow attorneys only reasonable compensation out of estate funds belonging to their clients

and to subject arrangements for attorneys' fees to judicial scrutiny and supervision.

The same result is now even more clearly warranted under the broader provisions of Section 221 (4).[29]

Likewise, in *In re Philadelphia & Reading Coal & Iron Co.*, 61 F. Supp. 120 (E. D. Pa.) the court allowed a bondholders' committee and its counsel a fee out of the estate for certain services. For other services which they performed under their contract of employment and which did not benefit the estate, the court held that they were entitled to be paid by the bondholders and fixed an appropriate fee for such services. The court said (p. 127):

> * * * this portion of the services, though within the duties of both committee and counsel under their employment and undoubtedly a proper charge against the bondholders, is not compensable by the estate. I fix the reasonable value of such portion of the services at $7,500 and an allowance from the estate will be made in the amount of $92,500.[30]

[29] See Appendix B, *infra*.

[30] See also *Nolte* v. *Hudson Nav. Co.*, 47 F. (2d) 166 (C. C. A. 2). In this case, a creditors' suit, attorneys representing about 12% of the general creditors succeed in reducing the claims of secured creditors against the free assets and thereby increased the available fund for distribution to the general creditors. The court held that since the attorneys benefited the general creditors as a class they were entitled

An analogous situation has been passed upon by this Court in reorganization proceedings under Section 77 of the Bankruptcy Act, 11 U. S. C. 205, in *Reconstruction Finance Corporation v. Bankers Trust Co.*, 318 U. S. 164, reversing 129 F. (2d) 122 (C. C. A. 8).[31] The indenture trustee for the mortgage bonds filed a petition with respect to fees for services which were alleged to have been performed not for the benefit of the debtor but in furtherance of the interests of the bondholders for whom it was trustee. The indenture trustee claimed that it had a prior lien for all of these services under the terms of the idenfure and urged that the lien be enforced under the contract, without reference to the maximum fee allowances set by the Interstate Commerce Commission under Section 77 (c) (12). This Court held that the indenture trustee's claim for fees for services performed to advance the special interests of the bondholders under the trust indenture could be compensated only within the limits prescribed by the standards of Section 77 (c) (12), since such services are considered to have been performed "in connection with the proceedings and plan."

5. The fact that in the cases discussed above the claims for fees were made against the funds to be distributed in the reorganization, whereas

to a fee from the free assets to be distributed to the general creditors, and directed the district court to fix the reasonable value of such services.

[31] See also *In re New York, New Haven & Hartford R. Co.*, 46 F. Supp. 236 (D. Conn.).

in the present case the rights of petitioners are asserted against the shares of stock held in escrow by the Committee, does not affect the bankruptcy court's jurisdiction. For purposes of bankruptcy jurisdiction, it is not necessary that the controversy be tied to a particular *res* which is *in custodia legis*. The bankruptcy court's jurisdiction extends to all matters pertaining to the proper administration of the proceeding and to the safeguarding of the investors' interests in the reorganization.[32] Moreover, with respect to fees, as shown above, the bankruptcy court is required to supervise all fees regardless of the source of payment; it also exercises control over protective committees and those who act on their behalf; and under Section 212 it has the power to scrutinize all agreements affecting the interests of security holders, including fee agreements. It is evident, therefore, that the court's jurisdiction over fees cannot be defeated by the simple expedient of arranging for their payment out of funds or assets other than those which security holders will receive under the plan of reorganization. In either case the net result is the same. The security holders' interests in the reorganization is substantially impaired through excessive fee claims, whether

[32] *Young* v. *Higbee Co.*, 324 U. S. 204, 214; *Continental Ill. Nat. Bank* v. *Chicago, R. I. Pac. Ry Co.*, 294 U. S. 648, 675 *ff*; *In re Schroeder Hotel Co.*, 86 F. (2d) 491, 493 (C. C. A. 7), quoted note 17, p. 15, *supra*.

such claims are charged against the proceeds to be distributed in the reorganization or against the stock which represents a proportionate interest in the proceeds.

6. From the foregoing discussion it follows, we believe, that the fee agreement involved herein, is not a mere private contract outside the scope of the bankruptcy proceeding. Petitioners herein were retained as counsel for the Committee, and in that capacity performed for the Committee services in connection with, and incident to the reorganization, for all of which services they subsequently sought unsuccessfully an allowance out of the estate in the amount of $125,000. Among such services were those relating to the unsuccessful assertion in the stockholders' behalf of creditor claims under certain sinking-fund provisions pertaining to the preferred stock. At the request of the Committee petitioners also performed other services, such as inquiry into the trustee's sales of some of the debtor's property and in general into his management of the estate, thus to an extent duplicating or encroaching upon the functions of the trustee in reorganization. Although under the circumstances, petitioners may not be allowed compensation out of the estate, we assume on the basis of the present record that their services were within the proper scope of the Committee's undertaking or function and that for these services petitioners may be compensated by the security holders, if such

was the understanding of all the parties concerned.

The effect of the agreement, however, is not to oust the bankruptcy court of its powers and duties in a Chapter X reorganization. As attorneys for the Committee representing public security holders, petitioners are fiduciaries and, for reasons previously indicated, their compensation, whether payable out of the estate or by security holders, must be limited to an amount which is reasonable in accordance with reorganization standards. It was, therefore, the bankruptcy court's responsibility to examine the agreement in question and to appraise, in the light of the objectives of Chapter X, the appropriateness and fairness of the fee claim thereunder, and make that appraisal as part of the statutory policy of protecting both the debtor and its security holders against excessive fee claims.[33]

7. The cases cited by petitioners in their brief (pp. 16–18) do not deal with the issue involved herein, nor can they be reasonably interpreted as importing the far-reaching effects which petitioners urge. In general, such cases as, for example, *In re Mt. Forest Fur Farms of America*, 157

[33] As previously stated, the Commission expressed its opinion that the reasonable value of all services was $70,000, including those not compensable out of the estate. On that basis, petitioners would receive $32,500 as additional compensation from security holders, provided, of course, that petitioners could establish the obligation to pay therefor under the escrow agreement.

F. (2d) 640 (C. C. A. 6), involved petitions for fee allowances out of the estate filed by attorneys for a committee or for a group of security holders.[34] The courts disallowed the petitions on the ground that the particular services did not benefit the estate, and merely suggested that for such services the attorneys might look for compensation to the security holders, assuming, of course, that the deposit agreement or other authorization under which the attorneys functioned expressly or impliedly permitted. Disallowance of the fee claim as a charge against the estate, however, did not foreclose further consideration of that claim by the bankruptcy court, nor did it imply that for lack of bankruptcy jurisdiction the committee and its counsel have an unfettered power to exact compensation from the security holders they represent.[35]

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[34] This applies also to the following cases: *In re Standard Gas & Electric Co.*, 106 F. (2d) 215 (C. C. A. 3); *In re Watco Corporation*, 95 F. (2d) 249 (C. C. A. 7); *In re Middle West Utilities Co.*, 17 F. Supp. 359 (N. D. Ill.); *In re Paramount-Publix Corporation*, 12 F. Supp. 823 (S. D. N. Y.); *Cooke* v. *Bowersack*, 122 F. (2d) 977 (C. C. A. 8).

[35] Considered in its context the statement in *Greensfelder* v. *St. Louis Public Service Co.*, 114 F. (2d) 53, 64 (C. C. A. 8) (also referred to by petitioners), that

"the court was not concerned with the question of the amount of fees which Mr. Greensfelder's clients * * * might be obligated to pay him"

is merely a statement of fact; i. e., that the court below was considering only the reasonableness of compensation payable

The case of *Zweifel* v. *Trans-State Oil Co.*, 99 F. (2d) 650 (C. C. A. 5), also stressed by petitioners, involved an agreement between an attorney and the debtor providing for payment of additional compensation after the closing of the estate. The district court held that, in view of the agreement, the attorney was not entitled to any fees from the estate. This decision was reversed on appeal. The court held that the attorney was nevertheless entitled to a fee out of the estate for such services as benefited the debtor, and expressly withheld approval or disapproval of the agreement "as beyond our jurisdiction on this appeal." If, as petitioners urge, the *Zweifel* case should be interpreted as holding that the bankruptcy court had no jurisdiction over the agreement at all, the decision would be in conflict with cases under the old Section 77B [36]; and

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out of the estate and was not at the time considering fees the attorney might receive from his clients. It was not a holding that the court had no jurisdiction over such fees.

Compare also *In re Barlum Realty Co.*, 157 F. (2d) 408 (C. C. A. 6), wherein the court modified its judgment to permit the fee claimants to amend their petition to assert a claim of a different nature.

[36] See *Wright* v. *City National Bank & Trust Co.*, 104 F. (2d) 285 (C. C. A. 6); *Silver* v. *Scullin Steel Co.*, 98 F. (2d) 503 (C. C. A. 8); *In re Republic Gas Corp.*, 14 F. Supp. 703 (S. D. N. Y.).

London v. *Snyder*, 163 F. (2d) 621 (C. C. A. 8), is likewise irrelevant. In that case the court held that an attorney representing a purchaser of the debtor's property under a sale plan was not entitled to a fee out of the estate, notwithstanding that the purchaser also happened to be a creditor of the estate.

since the case arose before the enactment of Section 221 (4), it clearly is not the law today.[37]

The principal reason for judicial denial of compensation out of the estate for certain categories of services performed by a committee or its counsel on behalf of public security holders is the need of keeping fees to be paid out of the estate within reasonable limits. In a complex reorganization there are likely to be several committees in the field and as a result there will be some overlapping in function and duplication of effort. Also, a committee or other representative for public security holders may devote substantial efforts in asserting or litigating, however unsuccessfully, the particular claims or interests of the security holders it represents, and indeed its fiduciary responsibility to the security holders may even require that it take a position entirely hostile to the reorganization.[38] Accordingly, if, in order to keep the cost to the estate within reasonable bounds,[39] a request by a committee or its counsel for a fee is denied on the ground that the services rendered are not compensable out of the estate, this in nowise suggests that such services are not

[37] See *Brown* v. *Gerdes*, 321 U. S. 178; *In re P-R Holding Corp.*, 147 F. (2d) 895, 899 (C. C. A. 2).

[38] See *In re Philadelphia & Reading Coal & Iron Co.*, 61 F. Supp. 120, 126 (E. D. Pa.).

[39] See *In re Paramount Publix Corp.*, 85 F. (2d) 588, 590–591 (C. C. A. 2); *Straus* v. *Baker Co.*, 87 F. (2d) 401, 407 (C. C. A. 5).

germane to the Chapter X proceedings. On the contrary, as the courts have pointed out [40] and as this very case demonstrates (p. 26, *supra*), such services are within the legitimate function of the committee whose primary responsibility is to assert and to protect the interests of the class it represents and on whose behalf it appears in the reorganization.

In short, while security holders in a proper case may agree to compensate the committee or its counsel for services rendered for their benefit and which are not compensable out of the estate, it is equally clear, for reasons previously discussed, that the terms and conditions under which the committee and its counsel were retained must be subject to supervision by the bankruptcy court. It is inconceivable to us that the statutory and equitable controls of the bankruptcy court should extend to every aspect of the committee's functions and activities (see p. 14, *supra*) and yet should not be deemed applicable to fee agreements between the committee or its counsel and the security holders whose interest they represent in the proceedings. As we have seen, such agreements have been the source of grave abuse in the past, and the purpose of Chapter X was to

[40] See *In re Standard Gas & Electric Co.*, 106 F. (2d) 215, 216 (C. C. A. 3); *Straus* v. *Baker Co.*, 87 F. (2d) 401, 408 (C. C. A. 5); *In re Philadelphia & Reading Coal & Iron Co.*, 61 F. Supp. 120, 126 (E. D. Pa.). See also *R. F. C.* v. *Bankers Trust Co.*, *supra*.

enlarge the judicial control over protective committees and their agents, and thereby to prevent them, as fiduciaries, from profiting through their strategic position in the reorganization either by charging excessive fees or by any other means.

II

THE JURISDICTION OF THE BANKRUPTCY COURT OVER THE FEE CLAIM, WHICH IS THE SUBJECT OF THE PRESENT LITIGATION, IS EXCLUSIVE

Our analysis in Point I, showing that the bankruptcy court has jurisdiction over the fee agreement involved herein, points also to the conclusion that such jurisdiction is exclusive. Indeed, this is necessarily so in view of this Court's decision in *Brown* v. *Gerdes*, 321 U. S. 178. In that case this Court held that Section 221 (4) gave the bankruptcy court exclusive authority, as against the State courts, with respect to allowances payable out of the estate. If, as we have argued, Section 221 (4) also applies to other fees incident to the reorganization, it follows that the bankruptcy courts have exclusive jurisdiction over such fees as well. For it can hardly be said that Section 221 (4) gives the bankruptcy courts exclusive jurisdiction over one class of fees and non-exclusive jurisdiction over the other.

In considering a request for fees the bankruptcy court is not merely passing upon an ordinary claim the determination of which it might in its discretion relegate to a state court. Judi-

rial control over fees, as previously indicated, is a vital part of the administrative functions of the Chapter X court, having been conceived by Congress as a means, among others, of safeguarding the interests of security holders and of assuring a fair and equitable reorganization. That responsibility, accordingly, cannot be delegated to another tribunal, in the light of Section 1334 of 28 U. S. C. (formerly Section 256 of the Judicial Code, 28 U. S. C. § 371), which vests jurisdiction in the federal courts "exclusive of the courts of the States" over "all matters and proceedings in bankruptcy," and especially by reason of Section 221 (4). For Section 221 (4) conditions confirmation of the plan of reorganization upon judicial scrutiny and determination of all fees, thus clearly implying that no plan can be fair and equitable which leaves the estate and its security holders exposed to the risk of exorbitant fees. Considered in this context the administrative control over fees exercised by the bankruptcy court is as indispensable to the reorganization process as the court's independent determination that the plan of reorganization is fair and equitable.

It was for these reasons that *Brown* v. *Gerdes*, 321 U. S. 178, held that fee claims against the estate are within the exclusive jurisdiction of the bankruptcy court and that exercise of such jurisdiction can neither be dispensed with nor discharged in another forum. The same considera-

tions are equally applicable to fee claims asserted, as in this case, by petitioners against security holders pursuant to a contract, since, as previously shown, 221 (4) is not limited to fees payable by the estate but is also applicable to all fees regardless of the source of payment. We submit, therefore, that the fee agreement involved in this proceeding was subject to examination and review exclusively by the bankruptcy court wherein the reorganization proceedings are pending, and that under no circumstances can the state court acquire with respect to such agreement the jurisdiction which Congress conferred solely upon the bankruptcy court and in terms denied to any other tribunal.

Petitioners also argue that since the plan of reorganization has already been consummated, Section 221 (4) cannot affect the validity of the fee agreement involved herein. They urge that Section 221 (4), insofar as it extends to fees payable by security holders, applies only to such fee arrangements as are incorporated within the plan and that the court's only power is to refuse confirmation of the plan (Pet. Brief, p. 14). But Section 221 (4) expressly provides also for judicial approval of all fees which are "to be fixed after confirmation of the plan"; and in fact, in most reorganizations the order confirming the plan generally reserves jurisdiction for the consideration of all requests for fees subsequent to

confirmation. Accordingly, when petitioners herein submitted their fee petition for all their services to the Committee, it was the exclusive responsibility of the bankruptcy court to review petitioners' request in its entirety, and to limit petitioners to a reasonable fee which will give recognition to their services to the estate and to whatever rights, if any, they might have under the agreement in question.[41]

Finally, exclusive jurisdiction of the bankruptcy court over all fees is also essential from the standpoint of the practical problems inherent in all fee determinations. An informed decision on whether a particular fee claim is reasonable depends upon an intimate knowledge of the work performed, an understanding of the specific problems and issues to which this work was directed, and an over-all appraisal of the extent to which the services rendered were necessary and effective for the protection of the class of security holders represented by the fee claimant. Moreover, claims to compensation for services payable out of the estate and for services chargeable to security holders commonly present interrelated issues of fact or law which cannot feasibly be

[41] It may also be noted that a dismissal of the state court action would not bar reconsideration of petitioners' claims by the bankruptcy court. Since the reorganization proceedings are still pending, petitioners could still apply to the bankruptcy court for appropriate relief and consideration of their fee claims.

separated for purposes of determination.[42] Needless to say, another tribunal than the bankruptcy court is hardly in a position properly to discharge this function, even if we were to assume that under its general equity jurisdiction another court could and would exercise the broad supervisory powers over fees granted to the reorganization judge.

CONCLUSION

The order of the New York Court of Appeals should be affirmed and the proceedings in the state court should be dismissed.

Respectfully submitted.

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[42] In the instant case, for example, the recovery if any under the escrow agreement has a direct bearing upon the amount properly payable from the assets of the estate. The allowance of $37,500 previously fixed by the District Judge was originally made in the understanding that the escrow agreement had been set aside (R. 18). It is evident that petitioners will not be entitled to the full allowance from the estate of $37,500 if under the escrow agreement there is recovered a substantial amount which added to the allowance of $37,500 would result in an unreasonable total fee.

APPENDIX A

The following are the pertinent sections of Chapter X (Act of June 22, 1938, 52 Stat. 883, 11 U. S. C. 501 *et seq.*) discussed in the brief:

211 (11 U. S. C. 611). Every person or committee, representing more than twelve creditors or stockholders, and every indenture trustee, who appears in the proceeding shall file with the court a statement, under oath, which shall include—

(1) a copy of the instrument, if any, whereby such person, committee, or indenture trustee is empowered to act on behalf of creditors or stockholders;

(2) a recital of the pertinent facts and circumstances in connection with the employment of such person or indenture trustee, and, in the case of a committee, the name or names of the person or persons at whose instance, directly or indirectly, such employment was arranged or the committee was organized or formed or agreed to act; * * *

212 (11 U. S. C. 612). The judge may examine and disregard any provision of a deposit agreement, proxy, power or warrant of attorney, trust mortgage, trust indenture, or deed of trust, or committee or other authorization, by the terms of which an agent, attorney, indenture trustee, or committee purports to represent any creditor or stockholder, may enforce an accounting thereunder, may restrain the exercise of any power which he finds to be unfair or not consistent with public policy and may limit any claim or stock acquired by such person or committee in contem-

plation or in the course of the proceeding under this chapter to the actual consideration paid therefor."

221 (11 U. S. C. 621). The judge shall confirm a plan if satisfied that * * *

(4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in, or in connection with the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge;

242 (11 U. S. C. 642). The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in connection with the administration of an estate in a proceeding under this chapter or in connection with a plan approved by the judge, whether or not accepted by creditors and stockholders or finally confirmed by the judge—

(1) by indenture trustees, depositaries, reorganization managers, and committees or representatives of creditors or stockholders;

(2) by any other parties in interest except the Securities and Exchange Commission; and

(3) by the attorneys or agents for any of the foregoing except the Securities and Exchange Commission.

APPENDIX B

The construction of the provisions and purposes of Chapter X urged herein is in accord with that expressed by the Securities and Exchange Commission in Part VIII of its *Protective Committee Report* to Congress referred to *supra*.[1] Although this part of the Report was formally submitted to Congress about two years after the enactment of Chapter X, we submit that weight may be accorded to the nearly contemporaneous interpretations expressed therein by an agency which had played an important role in the adoption of the many reforms incorporated under Chapter X. Referring to the jurisdiction conferred upon the bankruptcy court under Section 77B and Chapter X, the Report states at pp. 253–4:

> The supervisory power of the court [under Section 77B] over the amount of the fees received by parties to a reorganization was broader than the court's affirmative power to grant allowances out of the estate to these parties. Thus, any allowance of compensation or reimbursement for expenses, when paid by the debtor or by any new corporation acquiring its assets, was subject to final determination by the court. In addition, it was provided that "all amounts to be paid to committees or reorganization managers, whether or not by the debtor or any such corporation" must receive the approval of the court as a condition of confirmation of the plan.

[1] See note 11, *supra*.

There is little argument against, and much good reason for, subjecting all compensation and expenses, from whomsoever received, to the scrutiny and necessity of approval by the court. The provision last quoted above had the merit of supplying judicial scrutiny in the event, for example, of an attempt to compensate reorganization managers or protective committees by the device of a separate charge upon creditors or stockholders who assented to the plan of reorganization. But it lacked inclusiveness, since in terms it applied only to the fees and expenses of managers and committees. To a limited extent; i. e., as to committee attorneys not paid out of the general estate, the courts were able to overcome this difficulty through use of the so-called "scrutiny" clause of Section 77B. Thus, where a creditors' committee, in behalf of those whom it represented, contracted to pay its attorney 10 percent of any dividends or proceeds of payment paid to creditors represented by the committee, it was held that this exercise of the committee's power, and hence the attorney's remuneration, was subject to review and modification by the court, through the express power in the statute to scrutinize and disregard committee "authorizations."[2] Preferably, however, the court's power over compensation and expenses of any persons concerned in the proceedings should be a plenary power to review their reasonableness, from whatever source paid, and such power has now been granted to the courts by the provisions of Chapter X [Section 221 (4)].

[2] This is a summary of the *McCrory Stores* case, discussed pp. 21–23, *supra*.

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